

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK DEMONES GUNN,

Defendant-Appellant.

UNPUBLISHED

January 8, 2009

No. 281528

Kent Circuit Court

LC No. 07-003765

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree retail fraud, MCL 750.356c(2). He was sentenced as a fourth habitual offender, MCL 769.12, to four to 20 years in prison. Defendant appeals as of right, challenging only his sentence. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred in scoring Offense Variable (“OV”) 12 at ten points based on a determination that he had “three or more contemporaneous acts involving other crimes” see MCL 777.42(1)(c), and that the error resulted in his being sentenced outside the appropriate guidelines range. We disagree.

A contemporaneous criminal act is one that occurred within 24 hours of the sentencing offense and “has not and will not result in a separate conviction.” MCL 777.42(2)(a). Defendant maintains that his only contemporaneous criminal act was a retail fraud at a Kohls store. However, defendant admitted to possession and use of crack cocaine on two occasions during the day of the present offense. No record evidence suggests that defendant was criminally charged for these acts. Accordingly, there were sufficient contemporaneous criminal acts to score OV 12 at ten points. See *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that these other acts could be used for scoring only if admitted or determined by a jury. Defendant admitted to having twice possessed and used crack cocaine during the subject 24-hour period. This supported a score of points that would have resulted in the same sentencing range. Accordingly, since defendant did not raise this issue below, the scoring is not subject to review. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Moreover, in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), our Supreme

Court held that *Blakely* did not apply to Michigan's indeterminate sentencing scheme.

Defendant next argues that his sentence violated the federal and state constitutions for various reasons. He asserts that his expressed remorse should have been credited based on the federal sentencing guidelines. However, this is a state crime and defendant was sentenced in a state court; he does not explain why the federal guidelines should be applied under these circumstances. He also asserts that the sentence constituted cruel and unusual punishment. However, a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel and unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Defendant further asserts that the court failed to articulate why the maximum term was set at 20 years. However, as a fourth felony offender, defendant could have been sentenced to a maximum of life or a lesser term of years. MCL 769.12(1)(a). Defendant next asserts that the court failed to state why the sentence was proportionate, failed to have rehabilitative potential assessed and therefore did not have accurate information, failed to consider rehabilitative potential and remorse, and failed to depart downward based on defendant's illness of substance abuse. A court's articulation of reasons for a sentence is sufficient if the court relies on the sentencing guidelines. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Here, the court noted defendant's seven previous felonies and 36 prior misdemeanors, and recited the guidelines range before sentencing defendant to the highest end of the range. Nothing more was necessary. Moreover, that an assessment of rehabilitative potential might have provided more complete information does not render the information relied upon inaccurate. Since there was no scoring error or inaccurate information, we must affirm the sentence. *Kimble, supra* at 309.

Finally, defendant argues that he should have received credit for time served in jail against his sentence for the first-degree retail fraud conviction. A March 27, 2007, pre-bond report states that defendant was on parole at the time of this offense and that a detainer was in place. In *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006), this Court stated:

"When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Instead, a parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted. *Id.* Credit is not available to a parole detainee for time spent in jail attendant to a new offense because "bond is neither set nor denied when a defendant is held in jail on a parole detainer." *Id.* at 707.

Defendant argues, in essence, that *Seiders* was wrongly decided in that the Court did not follow basic rules of statutory construction. In support, he cites the trial court opinion in *People v Filip*, 278 Mich App 635, 754 NW2d 660 (2008). However, on appeal, this Court reversed the trial court in *Filip* and followed *Seiders*. Defendant's argument has no merit. Defendant also argues that a constitutional violation occurs where a defendant spends time in jail that exceeds the maximum on the prior offense. This question need not be addressed because there is no indication that such a situation occurred in this case.

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Kurtis T. Wilder